BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2014-346-WS

IN RE:)	**DIUC SUPPLEMENTAL**
)	**BRIEF REGARDING**
Application of Daufuskie Island Utility)	**SECOND REMAND**
Company, Inc. for Approval of an)	
Adjustment for Water and Sewer Rates,)	
Terms and Conditions.)	
)	

I. PROCEDURAL HISTORY

Five years have passed since Daufuskie Island Utility Company, Inc. ("DIUC") initiated this proceeding for approval of a new schedule of rates and charges for water and sewer service. Since that time the Commission has conducted two full evidentiary hearings on DIUC's application and there have been two appeals to the South Carolina Supreme Court. *See DIUC v. S.C. Office of Reg. Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) (hereinafter "*DIUC I*") and *DIUC v. S.C. Office Reg. Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019) (hereinafter "*DIUC II"*). The other parties to these proceedings are Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., Bloody Point Property Owner's Association (collectively "Intervenors" or POAs") and the South Carolina Office of Regulatory Staff ("ORS").

In the first appeal, DIUC asked the Supreme Court to consider Order 2015-846 wherein the Commission adopted every single adjustment agreed to by ORS and the POAs in a "Settlement Agreement" provided to the Commission the day before the hearing on DIUC's rate application. DIUC appealed five specific adjustments the Commission included in its Order when it adopted the Settlement Agreement. The Supreme Court reversed the Commission holding:

> ***the Settlement Agreement contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission***. Therefore, we hold the Commission erred in approving and adopting the Settlement Agreement and DIUC is entitled to a new hearing in which the parties may present any additional evidence. While ***we are reversing and remanding for a new hearing as to all issues***, in order to provide guidance to the Commission on remand, we address three allegations of errors raised by DIUC in this appeal.

DIUC I, 420 S.C. 305, 316, 803 S.E.2d 280, 286 (2017) (double emphasis added). Although the Court went on to provide guidance as to Bad Debt, Property Taxes, and DIUC's Elevated Tank Site inclusion in Utility Plant In Service, the Court's instructions were for the Commission to conduct a de novo hearing. *See DIUC I*, 420 S.C. at 320, 803 S.E.2d at 288 (concluding "the Commission erred in admitting into evidence and adopting the Settlement Agreement between ORS and the POAs. Therefore, we reverse and remand to the Commission for a de novo hearing.")[1]

On remand DIUC pleaded with the Commission for an expedited proceeding without further written discovery.[2] The POAs insisted they be allowed to serve more discovery, which the Commission permitted. The parties then prepared and submitted pre-filed testimony. In early December 2017, the Commission convened a rehearing wherein all the parties presented live witnesses and evidence. On January 31, 2018, the Commission entered its Order on Rehearing (Order 2018-68), but still did not approve the increase to rates as requested by DIUC.[3]

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[1] A de novo hearing was necessary upon initial remand because, as the Court pointed out specifically, the "***Settlement Agreement [wholly adopted by Commission Order 2015-846] contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission***." *Id.* (double emphasis added).

[2] It is important to recall that at this time DIUC could not meet its obligations because its rates were not properly set by Order 2015-846. *See* DIUC Brief, App. No. 2016-000652 at 25 (quoting Guastella testimony that "We're not going to have any return on equity, and we're not going to be able to make our debt service payments of principal and interest. It would put us right into bankruptcy. We need to have a real decision based on our real costs.")

[3] DIUC's application was based upon a 108.9% increase to rates to address, among other things, an unanticipated "immediate 25% annual shortfall of revenues because of [Melrose Utility's bankruptcy and] failure to pay its share of the jointly owned wastewater treatment plant." *See* DIUC Brief, App. No. 2016-000652 at 39. Order 2015-846 allowed a 43% increase. Order

DIUC appealed the Commission's Order on Rehearing. The two grounds appealed were that the Commission erred in excluding $542,978 from DIUC's Rate Case Expenses, and that the Commission erred in removing $699,631 from DIUC's Rate Base/Utility Plant In Service. Oral argument was held before the Supreme Court on April 18, 2019. At oral argument counsel was questioned by members of the Court regarding both issues on appeal – the Order on Rehearing's exclusion of Rate Case Expenses and the Order on Rehearing's reduction to Utility Plant In Service. *See* Video Recording of April 18, 2019, Oral Arguments (available online at http://media.sccourts.org/videos/2018-001107.mp4).

On July 24, 2019, the Supreme Court entered its decision reversing the Commission and remanding the matter back to the Commission, this time for a third hearing. *See DIUC II*, 427 S.C. 458, 832 S.E.2d 572 (2019), *reh'g denied* (Sept. 27, 2019). This second opinion was, like the first, quite clear in its rejection of the positions asserted by ORS and the POAs. However, in this decision the Court tellingly omitted any reference to another expensive, time-consuming de novo hearing. Instead, the Court stated:

> DIUC's rate application will now go before the commission for a third hearing. In our initial reversal and remand, we explained certain points of law applicable to the merits of DIUC's claims. *Daufuskie Island Util. Co.*, 420 S.C. at 316-20, 803 S.E.2d at 286-88. In this reversal and remand, we do not address the merits at all. In reversing the commission twice, we do not intend to make any suggestion of our views of the merits. Rather, we simply require the commission and ORS evaluate the evidence and carry out their important responsibilities consistently, within the "objective and measurable framework" the law provides.

DIUC II, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019), *reh'g denied* (Sept. 27, 2019) (quoting *Utils. Servs.*, 392 S.C. at 113, 708 S.E.2d at 765). Also, notably, in addressing the five adjustments raised in both of DIUC's appeals, the Court has not accepted a single position or adjustment

2018-68 allowed an approximately 88.5% increase, leaving a 20.4% shortfall, represented by the adjustments at issue in the current remand.

proposed by the ORS or the POAs.[4]

II. ISSUES TO BE DECIDED ON SECOND REMAND

Via letter dated November 15, 2019, DIUC informed the Commission of the Remittitur entered by the Supreme Court and the Court's reversal of the Order on Rehearing. DIUC requested the Commission schedule a limited hearing in response to the Supreme Court's decision:

> Because there have already been two hearings in this case, the record is fully developed and another hearing for further testimony or evidence is not necessary. Therefore, DIUC requests that the Commission set a limited hearing for oral argument from the parties regarding implementation of the Supreme Court's decision.

DIUC letter to Hon. Boyd, November 15, 2019. The Commission scheduled a hearing for January 21, 2020, and requested the parties submit memoranda to the Commission addressing the matters for the hearing.

In advance of the hearing DIUC identified the two issues for the Commission's consideration on remand:

1. Order 2015-846 Approving the ORS-POAs Settlement and Order 2018-68 on Rehearing both erroneously excluded $699,631 from DIUC's Utility Plant In Service. More recently, Order 2018-68 purports to rely on ORS testimony but ORS never identified the specific items of plant for the $699,631. The Commission could not have determined from Audit Exhibit ICG-5 (admitted as Hearing Ex. 18 and Rehearing Ex. 8) or from anything anywhere in the record what items of plant ORS adjusted for "non-allowable plant" or what costs ORS adjusted for "non-allowable plant." Further, DIUC presented testimony regarding the historical facts and accounting basis for its books and records. As such, the excluded $699,631 worth of DIUC plant assets should be included in DIUC's Utility Plant In Service in accordance with the documentation and testimony in the record from DIUC.

2. Order 2015-846 permitted DIUC to recover Rate Case Expenses for rate case work of its manager, Guastella Associates ("GA"). Based on the existing record, the Commission should apply the same standard thereby including Rate Case Expenses for GA fees incurred through September 30, 2017, up to a total revenue increase not to

[4] In light of this fact, the POAs' continued demands for further discovery and protracted hearings seem likely to lead to a similar result.

> exceed the noticed 108.9% rate increase. Remaining invoiced fees to GA could be presented for consideration as part of DIUC's next rate proceeding.[5]

DIUC's Memorandum Summarizing Matters to Be Addressed on Remand at 1.

III. ANOTHER EVIDENTIARY HEARING IS NOT NECESSARY AND WOULD NOT BE IN THE BEST INTEREST OF DIUC'S CUSTOMERS.

At the January 21, 2020, hearing DIUC's counsel further explained DIUC's position on the necessity of efficiency and the Supreme Court's endorsement of the same:

> We're back on remand from the Supreme Court, and the question for the Commission is how does the Commission efficiently and properly address the matter on remand in a way that will, hopefully, prevent another appeal, so that we can bring this matter to a close?
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> The utility's position is one of practicality and focused on efficiency. They have spent a tremendous amount of money on two full hearings, two full appeals, and now back on remand, and would like to do everything possible to proceed as economically as possible.
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> We believe that [the information necessary for the third order] is already included in the record such that the Commission does not require additional testimony or documentary evidence and, therefore, wouldn't require any additional discovery. Some of the other parties disagree with that position, indicating the idea that this is sort of … a preliminary hearing to decide how much information would be helpful to the Commission, to proceed. Again, our position is that the record fully developed over the two hearings is adequate to address the concerns of the Supreme Court.

Transcript at 5.

ORS also recognizes the need to efficiently resolve this proceeding. In response to DIUC's November 15, 2019, letter requesting a limited hearing without more discovery ORS "filed a responsive letter with the Commission on December 6, 2019, stating that 'provided DIUC submits no additional evidence, ORS is prepared to rest on the evidence it submitted in the initial two

[5] Inclusion of $269,356 for GA fees incurred through September 30, 2017. That would leave outstanding about one-half of the $542,978 of GA fees invoiced through September 30, 2017, or $273,662, to be recovered in a subsequent rate proceeding.

hearings.'" ORS Memorandum, January 16, 2020 (quoting ORS letter to Hon. Boyd, December 6, 2019). Concluding its January 16, 2020, Memorandum, ORS confirmed that it "is not submitting any additional evidence in this case and has not conducted any new discovery or audits of any of the Company's expenses." ORS Memorandum, January 16, 2020, at 7.

The POAs, on the other hand, once again ask the Commission to further extend this already protracted proceeding with even more discovery and yet another hearing. The POAs want a new "procedural schedule" to require DIUC to produce additional information and data and then allow ORS time to review the submission after which all the parties would submit even more pre-filed testimony in advance of a third hearing before the Commission on this five-year-old rate case. *See* POAs letter to Hon. Boyd, January 16, 2020, at 3. The inefficiencies and delays inherent in this request will benefit no one, not even the POAs, because driving up the rate expenses for the utility ultimately means more expenses to be covered by the ratepayers themselves.

Although DIUC was successful in both of its appeals, the financial impact of preparing for and completing two hearings and two appeals has been tremendous in both time and money.[6] It is unfortunate that a small utility like DIUC has been forced to litigate this rate case for five years and been subjected to continuously increasing rate case expenses just to incrementally obtain the rates necessary to cover its proven costs of operation. Now, after winning a second appeal and obtaining a second order of reversal from the South Carolina Supreme Court, DIUC faces the POAs' demands for more discovery and an unprecedented third full-blown hearing before the

[6] This rate case is based on data from a 2014 test year, only adjusted for limited known and measurable changes, so the duration of this case will ultimately benefit the ratepayers whose charges in 2020 and 2021 will essentially be based on DIUC's operating costs from six years prior in 2014. That means that even though the POAs have not succeeded on a single issue before the Supreme Court, their demands for hearings to retry the same matters have allowed them to extend this case so that whatever rates are ultimately put in place will be based on a six-year-old test year.

Commission because the POAs insist that the comprehensive record developed over the last two hearings must be supplemented yet again.[7] The cost of the POAs' requested exercise is not justified.

In its original application DIUC included $191,200 for rate case expenses, even though the actual rate case expenses were pushing $380,000 at the time of the first hearing. Mr. John Guastella, President of Guastella Associates, LLC, DIUC's manager, testified that in its 2012 rate case, DIUC requested $181,200, but the actual expenses amounted to $370,000. *See* Hearing Transcript at 181. Following DIUC's appeal of the Commission's first order, the Supreme Court's reversal, and a second fully litigated rate case DIUC's actual rate case expenses soared to nearly $800,000 plus $60,000 for bonds. *See* Rehearing Transcript at 76, lines 8-12 (Guastella testifying "the cost of actual rate case expenses as of September 30, 2017, including projections to complete the rehearing process for legal and consulting services totals $794,201.17, plus the $60,781.56 DIUC incurred for the bonds and an associated letter of credit.").

After the Commission entered the Order on Rehearing DIUC incurred additional rate case expenses to petition the Commission for reconsideration, which was followed by a costly second appeal to the Supreme Court and associated oral argument. DIUC is currently incurring even more rate case expenses to address the second remand hearing and how the Commission should respond to the reversal and remand by the Court.

A third evidentiary hearing would add thousands of dollars of rate case expenses thereby resulting in even higher rates for DIUC's customers. In other words, the POAs' positions and demands for discovery and another hearing are actually driving up their future rates. Most

[7] The Record on Appeal in the second appeal, App. No. 2016-000652, contains over 3,000 pages of testimony, exhibits, and pleadings.

importantly, however, is the fact that additional testimony will not provide any further significant or probative information about these two remaining issues beyond that already contained in the existing record, the details of which the Commission, ORS, the POAs, and the Court are fully aware.

The existing record's substantial evidence sufficiently establishes DIUC's cost of providing service, including the cost of plant in service and rate case expenses, and demonstrates no additional discovery or evidentiary hearing is necessary or justified.

IV. MATTERS FOR THE COMMISSION'S SECOND ORDER ON REMAND

A. The Excluded $699,631 Cost of Utility Plant in Service

South Carolina has long allowed utilities to earn "a fair return on the value of its property used and useful in the service of its customers." *De Pass v. Broad River Power Co.,* 173 S.C. 387, 389, 176 S.E. 325, 326 (1934). The reasoning is sound – when a utility invests in equipment and real property for use in providing service, the utility is allowed to charge rates sufficient to allow it to operate and maintain that plant in service. The more equipment and facilities that are part of plant in service, the higher the allowable rate.

S.C. Code of Laws, Regulation 103-702.16, entitled "Water Plant," defines the plant in service for a water utility like DIUC to include "all facilities owned by the utility for the collection, production, purification, storage, transmission, metering, and distribution of potable water." Despite this definition, the Commission's Order on Rehearing did not allow DIUC to include all of the items that comprise DIUC's water plant facilities that are used and useful to the utility.

Order 2018-68 excluded from DIUC's rate base $699,631 worth of DIUC's utility plant that is used and useful and providing service to DIUC's customers. The Order on Rehearing erroneously states Rehearing Exhibit 8 identifies the specific items of plant that the Commission intended to exclude from Rate Base/Utility Plant In Service. The Commission obtained that

reference from ORS's proposed order, but it is not accurate. Rehearing Exhibit 8 only lists primary plant *accounts*; it does not identify *items of plant*. The ORS adjustments by *plant account* cannot be identified by or matched with specific *items of plant*, the specific *costs of the items of plant* purportedly being adjusted are not provided, and there is no information about ORS's reasons for the adjustments. Accordingly, the Order's adoption of the ORS position is not supported by substantial evidence.

DIUC also presented unrebutted proof of the cost of the known plant items in accordance with NARUC standards. That is substantial evidence of their cost and was sufficient, if not conclusive, documentation of their value in the absence of contrary proof of their value. The existing record also contains Mr. Guastella's detailed, unchallenged, and unrefuted testimony that in addition to the "Melrose" costs, the other costs comprising the $699,631 are reasonable. *See* Hearing Transcript at 203 to 207. The Commission erred in rejecting this substantial evidence comporting with industry standards when it adopted, instead, the vague ORS adjustment for alleged "lack of contemporaneous invoices."

With regard to addressing this issue in the current remand, ORS has conceded that, "As to the issue of DIUC's authorized rate base, ORS offers no additional information beyond that already contained in the record, which contains ORS's position." ORS Memorandum, January 16, 2020, at 6. No discovery or evidentiary hearing is required.

Even if a third hearing were held, as the POAs suggest, it is inconceivable that a brand new POA expert would be retained then testify that in his/her opinion their estimate of the cost of the "Melrose" assets is different from the actual booked cost found reasonable and explained in two

hearings by Mr. Guastella.[8] Further, even if there were some expert who would offer such an opinion, any difference would not justify the rate case costs and other expenses that the customers will ultimately have to bear in order for this academic exercise to take place.

B. <u>The Excluded Rate Case Expenses</u>

DIUC's manager, Guastella Associates ("GA"), prepared the original rate application and all the underlying calculations that support the application's demonstrated costs of providing service to DIUC's customers. GA then guided DIUC through exhaustive discovery, including in excess of 150 discovery requests (exclusive of multiple subparts). GA, through its president John Guastella, prepared for litigation of the application by preparing testimony, reviewing the direct testimonies of all parties' witnesses, preparing rebuttal testimony, and then testifying as an expert at the hearing on the application. On remand, Mr. Guastella repeated all of these tasks as he led DIUC through the rehearing proceedings. In the two separate proceedings (hearing and rehearing), all Commissioners present witnessed multiple days of Guastella's testimony and reviewed multiple exhibits prepared by Mr. Guastella in the course of his work of DIUC.

Despite these facts, Commission Order 2015-846 adopted the ORS and the POA proposed "Settlement Agreement" that only allowed DIUC to recover only $75,000 in rate case expenses for consulting and legal fees associated with the rate case. This award was based on ORS witness Gearheart's testimony that ORS proposed the Commission allow rate case expenses to "include current rate case expenses of $75,000 and unamortized rate case expenses of $22,500 from the previous rate case." *See* Hearing Transcript at 494, line 22 to 495, line 5. In Commission 2015-

[8] Mr. Guastella is a nationally recognized expert in rate setting, valuation, and appraisals. He has provided consulting service to utilities around the country with respect to rate setting, valuation and appraisals, and utility management. *See* Affidavit of John F. Guastella, filed with DIUC's Motion to Reconsider Directive 2017-59-H and Directive 2017-60-H (Guastella testifying "In my career I have worked with utilities in some 30 states and have been qualified to testify as an expert in 23 states.").

846 Order Approving the Settlement Agreement, the Commission explicitly adopted Gearheart's reasoning to allow recovery for GA's rate case work:

> DIUC requested $191,200 for current and unamortized rate case expenses to be recovered over 4 years. (Guastella Rebuttal, R. p. 218). DIUC also testified that it would update its rate case expenses at the hearing to show the additional expenses incurred since the Application. (Guastella, R. p. 181). ORS proposed that rate case expenses total $97,500 and be amortized over five years. (Gearheart, Direct R. p. 494). The $97,500 consists of capped current rate case expenses in the amount of $75,000 for GA's preparation of the Application, developing rate models, calculating test year data, filing other rate case documents and legal expenses. ORS recommended $75,000 as a reasonable amount for rate case expenses in the last rate case. The remaining $22,500 is unamortized rate case expenses from the previous rate case. (Gearheart, Direct R. p. 495).
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> Upon review of the evidence, the Commission adopts ORS's adjustments for management fees, rate case expenses, and non-allowable expenses.

Order 2015-846 at 24 to 25.

DIUC appealed that ruling because the reduction of rate case expenses to $75,000 for all the work of DIUC's lawyers and GA personnel was too drastic. The amount was not related to the evidence in the record and it was not supported by the facts. However, this issue was not one of the specific issues discussed by the Supreme Court in *DIUC I*, so it was also the subject of testimony at the rehearing.

On remand DIUC presented additional testimony highlighting the tremendous financial impact the rate case expenses of this five-year rate proceeding have had upon DIUC. Mr. Guastella described how DIUC's expenses continued to mount for preparing and litigating the underlying rate case followed by an appeal and then remand discovery followed by a full merits rehearing. Mr. Guastella explained in his rehearing testimony:

> Rate case expenses are a necessary cost of operating any utility, but it is essential to note that the cost of a rate case has significant financial impact on a small utility like DIUC. **As I testified in the primary case, the rate case procedures and discovery required of DIUC in this matter were equal to those for a large utility.** The parties participated in exhaustive discovery prior to the hearing. DIUC

> was required to respond to in excess of 150 discovery requests (exclusive of multiple subparts), review the direct testimonies of nine witnesses, prepare rebuttal testimony and surrebuttal testimony, and prepare for the hearing on the Application. **A larger utility with larger revenue and more staffing would be better equipped to absorb the high costs of extensive discovery and other proceedings, but DIUC cannot.**

Rehearing Transcript at 70, line 16 to 71, line 3 (emphasis added).

Mr. Guastella also testified about the increased rate case expenses necessitated by the appeal and subsequent rehearing proceedings.

> DIUC's appeal of Order 2015-846 added another layer of significant rate case expense, which continues to grow as the current rehearing process proceeds. In order to survive, DIUC had to put appropriate rates in effect pending appeal. This required DIUC to obtain bonds, which first had to be presented to and approved by the Commission. The bonds later had to be renewed and an additional bond obtained. These efforts cost the Utility significant and unavoidable legal and consulting charges in addition to the cost of bonds. At this point, the cost of actual rate case expenses as of September 30, 2017, including projections to complete the rehearing process for legal and consulting services totals $794,201.17, plus the $60,781.56 DIUC incurred for the bonds and an associated letter of credit.

Rehearing Transcript at 76, lines 1-12.

After remand DIUC updated its rate case expenses then at the rehearing, DIUC requested $794,210 for current and unamortized rate case expenses to be recovered over 3 years. Rehearing Transcript 473, lines 15-17. In response, ORS totally reversed its previous position to instead claim on remand that every single effort of GA for rate case expense should be disregarded, including the work previously approved. *See* Order on Rehearing at 37-38. The Commission then disregarded its own finding from the first Order and ruled on rehearing that DIUC could not recover anything at all for the $542,978 in GA charges DIUC incurred to prepare its rate case, defend against the "Settlement Agreement," pursue appeal, and then prepare and retry the proceeding all over again on rehearing. Order on Rehearing at 38-39.

In the second appeal the Supreme Court reversed the Commission's adoption of the ORS

position finding, "The commission's wholesale rejection of every Guastella invoice appears retaliatory because the commission approved and awarded $75,000 for Guastella's services after the initial hearing." *DIUC II*, 427 S.C. at 462, 832 S.E.2d at 574. The Court went on to state:

> Additionally, in contrast to the commission's assessment of the invoices in its order after the initial hearing, the commission heavily scrutinized the format of the Guastella invoices on remand. The commission's order on remand provides, "The Commission agrees with ORS.... The evidence shows that a large sum of what DIUC seeks was based on invoices that could not be verified." The commission's order denying DIUC's motion for reconsideration also provides, "ORS ... completed a thorough review of all invoices from Guastella Associates, and found that they '***contained mathematical errors, lacked sufficient detail, and/or did not appear to be paid.'*** " ***However, the commission expressed these concerns with the invoices only in its evaluation on remand. The commission's harsher treatment of the same invoices on remand—of which rate case expenses were previously awarded—convinces us the commission itself employed a retaliatory standard of scrutiny.***

DIUC II, 427 S.C. at 462-3, 832 S.E.2d at 574 (double emphasis added).

In response to the Order, both ORS and the POAs filed petitions for rehearing that essentially repeated the same arguments specifically rejected by the Court.

> The ORS Petition asserts:
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> …the record indicates that certain rate case expense invoices ***contained mathematical errors, lacked sufficient detail, and/or did not appear to be paid***. (R. p. 1044, lines 11-18). It was not retaliatory or otherwise improper to deny recovery of expenses where, among other reasons, the expenses had not been paid. *(Id.;* Respondent's Brief, pp. 27-29; R. pp. 2792-2796).
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> Without appropriate justification, it would have been arbitrary, and a violation of this Court's ratemaking rulings, for the Commission to award these unpaid expenses to DIUC.

ORS Petition for Rehearing, August 5, 2019, at 3.

Discussing the GA rate case expenses rejected by ORS and the Commission, the POAs' Petition for Rehearing states, in part:

> The Opinion's comparison of the standards employed by the Commission in the original case and on rehearing overlooks this Court's mandate in [*DIUC I*] that the Commission conduct a "de novo hearing" on remand. Similarly, the Opinion's conclusion that the Commission scrutinized the invoices at issue more "heavily" and

> "harshly" on rehearing, as compared to the review applied in the original case, overlooks the different circumstances between the original case and the case on rehearing.
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> …ORS witness Hipp testified in her Direct Testimony (filed November 16, 2017) that GA invoices *contained mathematical errors, lacked sufficient detail, and/or did not appear to be paid.*

POAs Petition for Rehearing, August 8, 2019, at 4 and 5.

In addition to rejecting application of a harsher new standard of review, the Supreme Court flatly rejected the new standards themselves and the attempts by ORS and POAs to recycle failed arguments. The Court issued a short, clear order stating, "After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied." Order of Supreme Court, September 27, 2019.

No additional evidentiary hearing is needed for the same arguments to again be repeated or some other yet-to-be-defined level of scrutiny to be advocated, as encouraged by the POA's recent Memorandum. The question of evidence has been settled and the Court has explained its position. The Commission may correct its previous reduction of DIUC's rate case expenses based on the extensive testimony already in the record. There is no need for costly discovery and other unnecessary proceedings. It would be unfair to DIUC to have to incur further rate case expenses because the POAs demand more discovery and delays. Furthermore, requiring discovery and further hearing(s) would compound the punitive impact of the previous orders upon DIUC. *See DIUC II*, 427 S.C. at 463, 832 S.E.2d at 574 ("The commission's wholesale rejection of every Guastella invoice appears retaliatory because the commission approved and awarded $75,000 for Guastella's services after the initial hearing.").

C. Rates for Approval

The application that initiated this proceeding requested a 108.9% increase over the rates authorized pursuant to DIUC's last petition for rate adjustment. *See* Rehearing Transcript at 80. After the first appeal and remand to the Commission, on or about December 2017, DIUC provided testimony that the "current economic realities following remand" require DIUC obtain "a 125.7% increase over the rates authorized pursuant to the last petition for rate adjustment." *Id.* at 79. However, to keep the final rates within the Application's original 108.9% increase, of which the customers were notified, DIUC proposed to leave outstanding that portion of its rate case expenses beyond those that could be included within a 108.9% increase. *See* DIUC's Proposed Order, Docket Entry 273556.

Commission Order No. 2018-68 entered January 31, 2018, allowed an 88.5% overall rate increase that was designed to produce combined annual revenues of $2,023,759, or water revenues of $1,020,831 and wastewater revenues of $1,002,928.

The Commission can now enter an additional order or modified order that includes rate case expense of $269,356 and still remain within the noticed 108.9% increase and the $2,267,722 revenue requirement included in DIUC's original application.[9] Accordingly, DIUC requests that the Commission approve an overall 12.055% increase over currently existing rates as more fully detailed in the attached Schedule for Second Order on Rehearing. *See Exhibit A.*

These new rates would become effective on April 1, 2020, and be billed with DIUC's July 1, 2020, billing for service provided in the second quarter of 2020.

The proposed 12.055% increase added to the previously approved and implemented 88.5%

[9] The $699,631 Utility Plant In Service was (and remains) included in the calculation of the 108.9% increase.

increase is designed to produce combined annual revenues of $2,267,722, or $1,143,892 for water and $1,123,830 for wastewater. Consistent with the Commission's order permitting DIUC to request recovery of the GA rate case expenses in its next rate case, there would be a balance of $273,622 out of the $542,978 of GA charges for future recovery, plus additional rate case expenses for this case that are being incurred beyond the remand hearing.

D. Remediation / Reparations

"It is generally stated that the governing principle for determining rates to be charged by a public utility is the right of the public on one hand to be served at a reasonable charge, and the right of the utility on the other to a fair return on the value of its property used in the service." *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 595, 244 S.E.2d 278, 281 (1978) (internal quotations and citations omitted).[10] The necessity of two appeals in order to obtain rates that meet this standard and the length of this proceeding has delayed DIUC's ability to institute proper and reasonable rates to which the utility is entitled. Without the proper rates requested, DIUC has struggled to maintain and support its credit, financing has been incredibly difficult to obtain, and the income permitted has not allowed DIUC to earn a return on the value of the property which it employs for the convenience of the public and has not produced revenues and an operating margin within a reasonable range. These are all impacts that render a rate unfair and unconstitutional. *See S. Bell Tel. & Tel. Co.*, 270 S.C. at 595, 244 S.E.2d at 280 (citing *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of West Virginia*, 262 U.S. 679, 43 S.Ct. 675 (1923) and *Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591, 64 S.Ct. 281 (1944).

The length of this case and the costs to DIUC cannot be wholly addressed by a Commission order that only corrects the revenue requirement by including in DIUC's Utility Plant In Service

[10] Modified on other grounds by *Parker v. S.C. Pub. Serv. Comm'n*, 313 S.E.2d 290 (1984).

the $699,631 previously excluded and including the requested Rate Case Expense of $269,356. DIUC has also been damaged by and is in an inferior position because of the incredible delays in obtaining a proper rate ruling. Therefore, DIUC is entitled to the reparations as set forth in *Exhibit B*, *Remediation / Reparation Schedule*.

1. **The requested relief is consistent with South Carolina's regulatory statutes.**

Arguing that DIUC should suffer the delays caused by the actions of other parties to this proceeding, in its January 16, 2020, Memorandum ORS states:

> In accordance with S.C. Code Ann. §58-5-240(D), "the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case." A bond, authorized by both §58-5-240 and §58-5-340, is the legal mechanism which has been made available to utilities by the General Assembly. Having a bond would have allowed DIUC to collect the rates it applied for as opposed to the rates approved by the Commission in its last Order. DIUC chose not to put its requested (applied for) rates into effect under bond pending resolution of the second appeal. Therefore, the Company cannot collect revenues from its ratepayers going forward which it claims to have lost as a result of its decision to not post a bond while the current appeal was pending.

ORS Memorandum, January 16, 2020, at 5. This position is not supported by the regulatory structure in place in South Carolina.

Pursuant to S.C. Code § 58-5-240(C), the Commission must rule and issue its order approving or disapproving requested rate changes within six months after the date the schedule is filed. During this six-month period the utility's existing rates remain in effect; this period is often referred to as "regulatory lag." The primary purpose, then, of § 58-5-240(C) is to protect utilities from excessive regulatory lag that would result in inadequate rate relief. S.C. Code § 58-5-240(D) also provides a mechanism for putting requested rates into place pending appeal of an adverse Commission decision by allowing a utility to "put the rates requested in its schedule into effect under bond … during the appeal and until final disposition of the case." Thus, the General Assembly has established a timeline to protect utilities and afforded a mechanism allowing

originally filed rates to become effective pending the outcome of an appeal. This mechanism is broad, protects utilities, and it also protects customers by requiring refunds if the ultimate rates turn out to be less than the utility's filed rates that were in effect during the appeal.

The ORS argument that the Commission somehow lacks discretion to order payment of proper rates found to be lawfully due after appeal as well as making DIUC whole for the improper lose of earnings, just because a bond was not instituted is likewise without merit. In addition to the protections ORS agrees are afforded to utilities under S.C. Code § 58-5-240, Subsection (D) clearly provides the Commission discretion to issue an order utilizing a procedure <u>*other than a bond*</u> to ensure lawful ratemaking. *See* S.C. Code § 58-5-240(D) ("…or *there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested*.") (emphasis added).

2. <u>DIUC's financial inability to fund an appeal bond does not require DIUC to suffer deprivation.</u>

First and foremost, it is not DIUC's fault that this case has been pending for so long. However, ORS seeks to have the Commission punish DIUC by refusing DIUC the rates it should have been allowed because the length of the case exhausted DIUC's resources such that it could not afford to put another bond in place after expending funds to collect lawful rates in response to Order 2015-846. Contrary to the ORS Memorandum, DIUC did not ***<u>choose</u>*** not to put its requested (applied for) rates into effect under bond pending the resolution of the second appeal. ORS took that choice away from DIUC by the delayed, protracted, expensive proceedings that resulted in two appeals where the Supreme Court has not approved a single ORS position. It would be patently unfair if ORS could prevent DIUC from collecting rates properly owed just because DIUC could not afford to pay for a bond while it was litigating against the confiscatory rates demanded by ORS.

The need for the proper rates was great and DIUC did everything possible to obtain a bond. The exhaustive steps DIUC took through Mr. Guastella to attempt obtain a second renewal of the bond are contained in the affidavit that DIUC submitted October 16, 2017 (Docket #272662). Mr. Guastella testified:

> The term of the first bond was from July 1, 2016 to June 30, 2017. Because the Supreme Court appeal was still pending, the existing bond was renewed to continue in effect for an additional period of six months to expire on January 1, 2018. An additional surety bond was obtained for rates collected during six months beginning on July 1, 2017 and expiring on December 31, 2017. The premiums and banking charges paid by DIUC for these bonds total in excess of $60,000.
>
> In July of 2017, DIUC was unable to obtain bond renewals and additional bonds on its own. The bonding company ultimately agreed to issue the bonds if SunTrust Bank provided a letter of credit (LOC) for the last bonds. SunTrust would not provide the LOC until DIUC was able to convince one if its owners to personally secure the SunTrust letter with the transfer of certain deposits.
>
> Pursuant to Order No. 2017-59-H recently issued in this case, the schedule for rehearing and conclusion of this case will extend into 2018. Under this schedule, DIUC will need another extension of the existing bonds, which are now at a total of $1,203,595 and which expire on December 31, 2017. DIUC would have to have in place a renewal of the $1,203,595 plus another $430,042 for the next six months, resulting in a total bonded amount of $1,633,637, including interest.
>
> The personal funds used to secure the SunTrust LOC will no longer be available after December 31, 2017, when the current bonds expire. Without that LOC and due to the fact that the amount at issue will increase even more from $1,203,595 to $1,633,637, I cannot foresee any way that DIUC can obtain bonds after December 31, 2017.
>
> I have specifically attempted to obtain bonds by contacting Danny Sellers of Insurance Office of America. Mr. Sellers assisted with all the previous bonds required for this case and was the only agent who was able to successfully obtain the bonds for DIUC.
>
> Via email dated October 13, 2017, I inquired whether Mr. Sellers "could obtain a bond or bonds for the extension and additional amount totaling the $1,633,637, and if [he] could, would another letter of credit be required." See Attachment A.
>
> A telephone conversation with Mr. Sellers on October 13, 2017, and exchange of emails confirms that he cannot secure issuance of another bond for DIUC. As Mr.

> Sellers explained, the previous bond amount "was the maximum allowed from the Surety." See Attachment A.
>
> When DIUC obtained the most recent bonds, a letter of credit ("LOC") was also required. Anticipating this need, I contacted Carol Coppola, Vice President of SunTrust, to discuss the possibility of providing another LOC. See Attachment B. As indicated by Ms. Coppola's response, SunTrust is not willing to issue any additional credit to DIUC until the current rate case is resolved. Id.
>
> DIUC is not able to renew its existing bonds or obtain additional bonds for rates charged after December 31, 2017. This fact is demonstrated DIUC's recent efforts and my experience in attempting to secure previous bonds.
>
> Because of the impossibility of obtaining bonds and the threat to DIUC if it not allowed to collect rates greater than those allowed by Order 2015-846, DIUC requires this matter be set for hearing as soon as possible so that a decision could be issued by the Commission prior to December 31, 2017.

Affidavit of John F. Guastella, filed with DIUC's Motion to Reconsider Directive 2017-59-H and Directive 2017-60-H.

Additionally, contrary to the ORS Memorandum, it is not merely a "claim" that DIUC lost revenues during this protracted rate proceeding – the facts are that DIUC actually lost $790,465 in earnings value, as detailed above, representing lost return on investment. Moreover, DIUC tried but was unable to obtain a second renewal of the original bond, as the Commission specifically recognized by holding the remand hearing and issuing a decision before the end of 2017 so that new rates would become effective on January 1, 2018, when the renewed bond would expire.

3. The reconciliation is not retroactive ratemaking

Finally, contrary to the assertion in the ORS Memorandum, this necessary reconciliation of rates and charges to address the timing of the various orders within this lengthy proceeding are not retroactive ratemaking.

The principle of retroactive ratemaking is applicable in cases where a utility files a new rate application and seeks recovery of past under earnings that the regulated utilityexperienced as

a result of lawful rates. DIUC's rate application in this case does not seek recovery of under earnings since its last rate case. Instead, after two successful appeals and nearly five years, the rates the Commission approves on this second remand should be instated to reflect the need for the proper rates as far back as January 1, 2018, which would have generated sufficient revenues to cover operating expenses and a reasonable return on investment. Approving reparations is not retroactive ratemaking but is, instead, the mechanism with which to properly reverse the existing confiscatory rates that have been in effect since January 1, 2018. *See e.g., Lederle Labs. Div. of Am. Cyanamid Co. v. Gioia*, 456 N.Y.S.2d 844, 846 (1982) (Commission assessment of revenue loss attributable to delay in proper rates was proper and not retroactive ratemaking).

The case cited by ORS, *S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980), involved rates that "were set and approved as reasonable by the Commission, yet in its refund order, the Commission sought to reduce those past-approved rate." *Id.* that is not the issue here. There is no lawfully approved rate order here. The issue involved here is DIUC's constitutional right to collect rates that meet the minimum constitutional standards. *See Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 107 n.8, 708 S.E.2d 755, 761 (2011) (citing *Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of W. Va.*, 262 U.S. 679, 690, 43 S. Ct. 675 (1923) (explaining that where the rates allowed for a public utility company "are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service…their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment")).

Under the unusual circumstances of two full investigations and hearings and two appeals within the same rate case, allowing reparations is the only appropriate mechanism under which DIUC will be protected from another inadequate rate allowance and an improper shortfall in

earnings during a rate proceeding lasting disproportionately longer than the six-month statutory period prescribed by the statute. The necessity of constitutional protection for the utility combined with the clear discretion afforded the Commission by S.C. Code § 58-5-240(D) make clear the requested reparations are authorized and just, not retroactive ratemaking.

4. <u>The ORS suggestion that DIUC file another rate case is unrealistic.</u>

The ORS Memorandum, January 16, 2020, also included the following statement: "DIUC has possessed the right to file another rate case with the Commission for the past three and a half years. The Company therefore cannot now effectively assert that is has been disadvantaged or denied the ability to collect rates based on its current rate base and expenses." Memorandum at 6. It would not have made any business sense for DIUC to have two costly rate cases running concurrently, necessarily dealing with the same unresolved major issues, and during a pending appeal before the Court on those issues. The Court's finding of retaliatory treatment ought to be enough to dispel any idea that DIUC cannot now collect lawful rates because while ORS and the POAs were dragging this case out DIUC did not ask to file a another rate case where presumably the same thing would happen thereby doubling the already enormous cost and burden upon this small utility.

V. <u>CONCLUSION</u>

The Commission cannot allow this case to proceed to discovery and evidentiary hearing simply because the POAs think that is a good idea. Instead, DIUC respectfully requests the Commission take control of the matter to bring it to promptly to its proper resolution by foregoing any further discovery or evidentiary hearings and proceeding quickly to issue an order addressing the issues herein raised. Further, pursuant to Order of the Supreme Court dated January 17, 2020, the Commission should enforce the order awarding costs to DIUC in the amount of $13,807.25

against Respondents South Carolina Office of Regulatory Staff, Haig Point Club and Community Association Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association.

Respectfully submitted,

/s/ Thomas P. Gressette, Jr.

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April 1, 2020
Charleston, South Carolina

CERTIFICATE OF SERVICE

This is to certify that on April 1, 2020, I caused to be served upon the counsel of record named below a copy of the foregoing **DIUC SUPPLEMENTAL BRIEF REGARDING SECOND REMAND** via electronic mail, as indicated. A copy was also electronically filed via the Commission DMS.

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EXHIBIT A
SCHEDULE FOR SECOND ORDER ON REHEARING

1. Including the $699,361 of utility plant in service.

2. Increasing the allowed rate case expense so that DIUC can recover via 3-year amortization a portion of the $542,978 for Guastella Associates ("GA") rate case expenses sufficient to bring the overall rate increase to the 108.9% increase. That increase results in total revenues of $2,267,722, as requested in the original Rate Application. DIUC would recover $269,356 for GA fees incurred through September 30, 2017. That would leave outstanding about one-half of the $542,978 of GA fees invoiced through September 30,2017, or $273,622.

3. Deferring of any Commission decision on the remaining $273,622 GA rate case expenses. DIUC may recover these expenses in its next rate proceeding. At that time DIUC would also present its additional post-September 30, 2017, actual rate case expenses for the conclusion of this docket to enable an accurate accounting of all unrecovered rate case costs for Docket 2014-346 that should be considered in the next rate case.

4. Ordering new rates effective as of April 1, 2020, for services provided on and after April 1, 2020.

5. The April 1, 2020, billing for services provided in the first quarter of 2020 would be billed at the 88.5% increase. The July 1, 2020, billing would relfect the 108.9% increase and would also invoice a surcharge for the carrying costs of the 108.9% increase in the combined amount of $521,809 to address the difference between the January 1, 2018, increase of 88.5% permitted by the Commission on remand and the full 108.9% increase. Recouping this amount will allow DIUC to obtain the carrying cost related to the delay in obtaining the 108.9% rates, calculated at the 9.31% equity rate of return allowed by the Commission on remand.

6. Prior to the July 1, 2020, billing, DIUC would invoice corrections for the $232,542 credit made to customers with January 1, 2018, billing for difference between the 88.5% increase granted by the Commission on remand and the requested 108.9%, adjusted to $268,656 to reflect DIUC's carrying costs through March 31, 2020.

7. The July 1, 2020, billing for services provided in the second quarter and the quarterly billings thereafter would be billed at the 108.9% increase.

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EXHIBIT B
REMEDIATION / REPARATION SCHEDULE

1. For the credit of $232,542 made to the customers in the January 1, 2018, billing, which was based on the difference between the 108.9% increase in effect under bond and subject to refund, plus 12% interest. This amount was refunded when the Commission's Order on Rehearing only allowed an 88.5% increase, which became effective January 1, 2018, for service from April 1, 2016, to January 1, 2018 (the duration the 108.9% increase was in effect).

2. For the period from January 1, 2018, until April 1, 2020, when the 108.9% increase should have been in effect, instead of the 88.5% increase, in order for DIUC to cover the corrected revenue requirement that is consistent with the Court's decisions. The inadequate rate increase since January 1. 2018, resulted in a revenue shortfall in the combined amount for water and wastewater of $451,665 for DIUC's billings for the years 2018, 2019, and the first quarter of 2020.

3. For the time value of money or carrying costs related to the lost earnings for both the $232,542 reversal of the January 1, 2018 credit and the $451,665 revenue shortfall for 2018, 2019, and the first quarter of 2020. Instead of the 12% interest rate required to be paid to customers in the event of overcharges of rates subject to refund, DIUC proposes to use a rate of 9.31% for the undercharges, which is the equity rate allowed by the Commission in this case.

4. For the period from January 1, 2018, to March 31, 2020, the weighted average compounded rate is 15.53%. Applying the 15.53% to the $232,542 credit amount produces a total reparation of $268,656 and applying this rate to the $451,665 revenue shortfall produces a total reparation of $521,809.

5. In order to mitigate the impact on customers, DIUC proposes that the two reparation amounts be recovered through separate surcharges; the $268,656 as soon as practicable after the Commission's final decision in this case and the $521,809 at the time of the July 1, 2020, billing.[1]

[1] As required, DIUC has kept records of payments by each customer so that precise amounts would be charged to each customer.